

FEDERAL CIRCUIT COURT OF AUSTRALIA

KUMAR v MINISTER FOR IMMIGRATION & ANOR [2019] FCCA 169

Catchwords:

MIGRATION – Administrative Appeals Tribunal – partner (temporary) (class UK) (subclass 820) visa – application dismissed.

Legislation:

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth)

Cases cited:

Minister for Immigration and Citizenship v SZLFX (2009) 238 CLR 507

SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609

SZRUI v Minister for Immigration & Citizenship (2013) FCAFC 80

Applicant:	SUMIT KUMAR
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	MLG 756 of 2017
Judgment of:	Judge Mercuri
Hearing date:	15 October 2018
Date of Last Submission:	15 October 2018
Delivered at:	Melbourne
Delivered on:	26 February 2019

REPRESENTATION

Advocate for the applicant:	In person
Solicitors for the applicant:	None
Counsel for the respondents:	Ms S He
Solicitors for the respondents:	Mills Oakley

ORDERS

- (1) The applicant's application for judicial review filed 13 April 2017 be dismissed.
- (2) The applicant pay the first respondent's costs in a sum to be fixed.
- (3)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 756 of 2017

SUMIT KUMAR

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application filed on 13 April 2017 under the *Migration Act 1958* (Cth) (“the Act”) in which the applicant seeks judicial review of the decision of the second respondent made on 17 March 2017 affirming a decision of a delegate of the first respondent, the Minister for Immigration and Border Protection (“the Minister”) made on 13 November 2015 refusing to grant the applicant a Partner (Temporary) (Class UK) (Subclass 820) visa (“the visa”).
2. The tribunal’s decision is found at pages 204 to 212 of the court book.

Summary

3. For the reasons that follow, this application for judicial review fails.
4. I make orders dismissing the proceedings and order the applicant to pay the first respondent's costs.

The applicant's claims

5. On 15 September 2014, the applicant applied for a Partner visa on the basis of his marriage to an Australian citizen, Ma Hong Sina Peov ("the sponsor").¹ The applicant provided a Form 40SP – Sponsorship for a partner to migrate to Australia completed by his sponsor; a Form 956 – advice by a migration agent; evidence of his sponsor's Australian citizenship and her two divorce orders and the couple's marriage certificate.²
6. On 17 September 2015, a delegate of the first respondent wrote to the applicant requesting more information in order to consider his visa application.³ On 19 October 2015, the Department received a letter signed by the applicant; two signed and declared Form 888s; the applicant's Australian and Indian police clearance certificates; various documents identified as "*evidence of relationship documents*" and photographs of the applicant and sponsor together.⁴
7. On 13 November 2015, a delegate of the first respondent made a decision to refuse to grant the applicant a Partner visa, finding the applicant did not satisfy clause 820.221 in schedule 2 to the *Migration Regulations 1994* (Cth) ("the Regulations"). The delegate was not satisfied that, at the time of decision, the applicant was the spouse or de facto partner of his Australian citizen sponsor. The applicant was notified of the decision by an email sent to his representative.⁵
8. Orders made by consent on 25 October 2017 permitted the applicant to file and serve an amended application and any additional evidence by

¹Court book page 1 to 27.

²Court book pages 1 to 10 and 28 to 39.

³Court book pages 54 to 60.

⁴Court book pages 61 to 102.

⁵Court book pages 103 to 130.

29 November 2017. No amended application or additional evidence was filed and the applicant had not filed any written submissions.

9. The applicant appeared before the tribunal on 7 March 2017 to give evidence and present arguments. The tribunal also received oral evidence from Hong Sina Peov and Sonny Kim.
10. The hearing was conducted with the assistance of an interpreter in the Hindi and English languages.
11. The applicant was represented in relation to the review by his registered migration agent. The representative attended the tribunal hearing.

The tribunal's reasons

12. Clauses 820.211 and 820.221 require that at the time the visa application was made, and at the time of the tribunal's decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
13. 'Spouse' is defined in section 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis.⁶ In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in regulation 1.15A(3).-
14. On 17 March 2017, the tribunal affirmed the delegate's decision.⁷ The tribunal was not satisfied that the applicant and sponsor were in a

⁶ Migration Act 1958 (Cth) section 5F(2)(a)-(d).

⁷ Court book pages 204 to 212.

spousal relationship at the time of application or decision, and therefore did not meet clause 820.211 and 820.221 of the Regulations.⁸

15. The tribunal accepted that the applicant and sponsor were married to each other under a marriage that was valid for the purposes of the Act as required by section 5F(2)(a)⁹ and proceeded to consider whether a spousal relationship existed having regard to regulation 1.15A(3). In considering the financial aspects of the relationship, the tribunal found that the applicant and sponsor lived in the sponsor's home before moving to another address. The tribunal had regard to the limited financial means of the parties, and that this *"reduces mingling of assets, liabilities pooling of resources and any obligations owed to each other."*¹⁰ The tribunal accepted that the parties' financial position was what *"could be expected in a spousal relationship given the circumstances"*.¹¹
16. In considering the nature of the parties' household, the tribunal considered a range of account statements and bills addressed to the parties at a common address. Whilst the tribunal gave this material regard, it was *"slight"*, finding that it did not *"shed a great deal of light on the couple's living arrangements."*¹²
17. The tribunal noted that although the applicant and sponsor submitted no *"home setting photographs"*, they could describe features of their home and routine and gave consistent accounts of mutual care of the sponsor's children, which it had regard to.¹³
18. The tribunal also considered the written statements of family and friends in order to ascertain the nature of the parties' household, as well as the oral evidence of the sponsor's friend given at hearing. The tribunal gave the oral evidence regard, but found the written statements were very brief and used *"general and generic and unspecific descriptions"* that did not enlighten the tribunal about the nature of the parties' relationship. The tribunal found that there were *"concerns"*

⁸ Court book page 211 at paragraphs [61] to [63].

⁹ Court book page 206 at paragraph [11].

¹⁰ Court book page 206 at paragraphs [12] to [16].

¹¹ Court book page 206 at paragraph [18].

¹² Court book pages 206 to 207 at paragraphs [19] to [21].

¹³ Court book page 207 at paragraphs [23] to [25].

about the nature of the household and so gave this factor "*lesser weight*".¹⁴

19. In considering the social aspects of the relationship, the tribunal had regard to the evidence of the witnesses and the generally worded declarations of the parties' friends, as well as the oral evidence of the sponsor's long standing friend, Ms Kim.¹⁵ However, it had concerns about the social aspects of the relationship arising from the vague and inconsistent evidence provided by the applicant and sponsor at the hearing regarding their marriage ceremony and celebration.¹⁶ In light of these concerns, the tribunal placed "*lesser weight*" on this consideration in evidencing that they were in a genuine and continuing relationship.¹⁷
20. In considering the nature of the applicant and sponsor's commitment to each other, the tribunal found that the parties had "*apparent knowledge of one another consistent with the parties having lived together*".¹⁸
21. However, it found that the parties' written statement dated 14 October 2015 was fairly general about the degree of emotional support and companionship the parties offered each other. It noted that while the statement indicated that the sponsor was pregnant, oral evidence was provided by the applicant at the hearing that the pregnancy ended either by miscarriage or by termination for certain health and other reasons.¹⁹
22. The tribunal raised concerns about a number of trips taken by the sponsor to Cambodia without the applicant, and identified inconsistencies between the parties' evidence in relation to one of the sponsor's trips to Cambodia in October 2014.²⁰
23. It was also concerned by the parties' inconsistent accounts of the marriage proposal and their engagement²¹ and the applicant's limited knowledge of the sponsor's previous life, including the identity of her

¹⁴Court book pages 207 to 208 at paragraphs [27] to [29].

¹⁵Court book page 208 at paragraph [33].

¹⁶ Court book pages 208 to 209 at paragraphs [37] to [41].

¹⁷Court book page 209 at paragraph [42].

¹⁸Court book page 209 at paragraph [44].

¹⁹Court book page 209 at paragraph [45].

²⁰Court book page 209 at paragraphs [47] to [48].

²¹Court book page 210 at paragraphs [49] to [52].

previous partners who were fathers to her children.²² These concerns caused the tribunal to give "*lesser weight*" to the nature of the parties' commitment to each other in evidencing that they were in a genuine and continuing relationship.²³

24. Having regard to all of these considerations, the tribunal was ultimately not satisfied that at the time of application and time of decision, the parties were in a spousal relationship and found the applicant did not meet clause 820.211 and clause 820.221.²⁴
25. The tribunal's factual findings were open to it on the material before it. The tribunal clearly appreciated that in assessing whether the parties were in a married relationship it was required to have regard to the circumstances of the relationship as set out in regulation 1.15A (3). As set out above, I am satisfied it had regard to those factors.
26. At the hearing before me, the applicant appeared on this own behalf. When asked what he wanted to say in support of his application, the applicant said

*27. I just want to say on the administration appeal... I went with my wife... And we explain everything. Even they asked personal questions. We answered that. But they were asking a lot of question from – like, backdate. We just miss a little bit. But most of the things – I explain them...my responsibility with my family and everything; when I had that much money that we can travel, go around, do lavish marriage, this, that – we just living together. That's what I explain to them. All my documents – because when was the time of the appeal, my father die. I have to go back to India and then come back here straightaway. That's why I couldn't collect too many document. And I explain to them. And they cancel my – they refuse it.*²⁵

28. In response, it was said on behalf of the Minister that, to the extent that the applicant complained about the way in which the tribunal conducted its hearing by asking questions – this does not disclose any error on the part of the tribunal, having regard to the fact that the

²²Court book page 210 at paragraph [53] to [58].

²³ Court book page 210 at paragraph [58].

²⁴ Court book page 211 at paragraphs [61] to [63].

²⁵ Transcript page 2 at lines 28 to 45.

tribunal is an inquisitorial body and it is open to the tribunal to ask questions and test evidence.²⁶ I agree with the Minister's submissions in this regard. Moreover on fair reading of the tribunal's reasons disclose that the tribunal did consider and have regard to the evidence given by the applicant.

Ground one

29. The applicant's first ground of review is:

30. The Tribunal failed to ascertain that I am in a spousal relationship with my wife.

31. I accept the Minister's submissions that ground one is not a proper ground of review and goes no further than an impermissible invitation for the court to review the merits of the tribunal's decision.

32. Ground one does not identify any error of law and is therefore not made out.

Ground two

33. The applicant's second ground of review is:

34. The Tribunal stated in its decision was that the financial position of the couple is what it could be in the given circumstances but failed to give it relevant consideration while deciding on the application for the review.

35. It was submitted on behalf of the Minister that contrary to this assertion, the tribunal plainly considered the couple's financial situation.²⁷ Although it accepted their financial situation "*was what could be expected in a spousal relationship*",²⁸ it was not satisfied that the parties were in a spousal relationship having regard to all of the relevant considerations.²⁹

36. The financial situation between the parties was but one of the factors that the tribunal had to have regard to. It was not determinative. It was clearly open to the tribunal to make the findings it did on the basis of

²⁶*SZRUI v Minister for Immigration & Citizenship* (2013) FCAFC 80 at [4], [24] and [87].

²⁷Court book page 206 at paragraphs [12] to [18].

²⁸Court book page 206 at paragraph [18].

²⁹Court book page 210 at paragraph [59].

the available materials and for the reasons provided. The tribunal is entitled to accept or reject or give such weight to the evidence proffered as it thinks appropriate in all the circumstances.

37. Ground two does not disclose a jurisdictional error and is not made out.

Ground three

38. The applicant's third ground of review is:

39. The Tribunal did not regard the statements of the applicants. The applicant stated that the wife got pregnant and had to abort due to health reasons. The Tribunal failed to ask for evidences regarding the claims and consider the fact that the applicant is in a genuine relationship with the sponsor.

40. Contrary to the applicant's assertion, the tribunal wrote to the applicant's representative prior to the hearing pursuant to section 359(2) and requested that the applicant provide further information to support his claim that he and the sponsor were in a spousal relationship.³⁰
41. Further, the tribunal expressly noted the oral evidence of the parties that the sponsor had suffered a miscarriage and terminated a pregnancy in 2015 due to health and other reasons.³¹ The tribunal was not required to make the applicant's case for him. Nor was it obliged to act as cross-examiner or prompt and stimulate an elaboration that the applicant chooses not to embark upon. It was for the applicant to provide his evidence and arguments in sufficient detail to enable the tribunal to reach the requisite state of satisfaction.
42. The materials before the court also do not establish that the tribunal was under a duty to inquire in the sense that there was a failure to make an inquiry about a critical fact the existence of which was easily ascertained.
43. Accordingly, I accept the submissions on behalf of the Minister that this ground is without substance and find that ground three is not made out.

³⁰ Court book pages 138 to 142.

³¹ Court book page 209 at paragraph [45].

Ground four

44. The applicant's fourth ground of review is:

45. *The Tribunal did not consider the fact that the applicants have four children in the household and husband and wife look after the kids and it happens only if they are in a genuine spousal relationship.*

46. A fair reading of the tribunal's reasons show that the tribunal did consider the care which the parties provided to the sponsor's four children, finding that the parties gave "*a consistent account of mutual care for the children*" and had regard to that fact.³²

47. As noted above, the tribunal was not satisfied that the parties were in a spousal relationship, having regard to all of the relevant considerations.³³ This finding was open to the tribunal and no error is disclosed. I therefore find that this ground is not made out.

Ground five

48. The applicant's fifth ground of review is:

49. *The applicants provided submissions by various persons regarding the relationship. The Tribunal failed to consider the submissions by friends and relatives regarding the relationship.*

50. The facts do not support this ground. The decision record plainly discloses that the tribunal did have regard to the declarations made by the parties' friends and relatives; however, it found the declarations were of a general nature and did not enlighten it about the nature of the parties' household or the nature of their relationship.³⁴ It also found the written declarations to be worded in "*brief and general terms*".³⁵

51. Taken at its highest, this ground goes no further than an invitation for the court to undertake impermissible merits review and for these reasons is not made out.

³²Court book page 207 at paragraph [25].

³³Court book page 210 at paragraph [59].

³⁴Court book page 207 at paragraph [28].

³⁵Court book page 208 at paragraph [31].

Ground six

52. The applicant's sixth ground of review is:

53. The Tribunal tried to ascertain the nature of the household from the submissions of the friends and relatives. This is irrelevant consideration. The Tribunal said in its decision that the submissions do not explain the nature of the household. The Tribunal failed to consider that the household is married couple's private matter and cannot be discussed with the friends and relatives.

54. This ground contradicts the allegation in ground five, that the tribunal failed to consider the submission of their friends and families.

55. As stated above, the tribunal considered the submissions of family and friends as one relevant consideration when ascertaining the nature of the parties' household.³⁶ This evidence was considered alongside the oral and documentary evidence provided by the applicant and sponsor in support of their application.³⁷

56. It was a matter for the tribunal to identify such material as it found relevant to its reasoning and to give that material appropriate weight. Again, the applicant's complaint effectively seeks merits review and ground six is not made out.

Ground seven

57. The applicant's seventh ground of review is:

58. When considering the social aspects of the relationship, the Tribunal considers that the marriage ceremony was not big or lavish. The Tribunal failed to consider the nature of the household and family income. The couple are not high earning couple and applicant's wife has four children to look after. The applicants are not in a position to spend more on the ceremony.

59. The tribunal considered the couples' financial circumstances in their favour, noting that they had limited financial means and their financial

³⁶ Court book pages 207 to 208 at paragraph [28].

³⁷ Court book pages 206 to 207 at paragraphs [19] to [26].

position was what could be expected given their circumstances.³⁸ Nowhere in its written reasons does the tribunal make mention of the fact that the *"ceremony was not big or lavish"*, in the context of drawing a conclusion that the relationship was not genuine.

60. Rather, it considered the applicant's explanation that his wife had not invited anyone to their wedding because they *"did not have enough money and wanted to celebrate later"* to be *"a rather clouded set of reasons"* for not inviting people to such an important event, *"when it is considered that the applicant invited friends yet stated that the sponsor did not"*.³⁹
61. The tribunal's factual findings were open to it for the reasons it gave. This ground is not made out.

Ground eight

62. The applicant's eighth ground of review is:

63. The Tribunal considers that the applicant said that his wife did not invite anyone in the marriage ceremony but she invited a friend Sonny Kim in the marriage is a different account of the statements. The Tribunal erred that this is different account of statements. Having one friend in the ceremony is equal to having not invited anyone. This is irrelevant to consider this as a different account of statements.

64. The applicant and sponsor gave differing accounts of who attended their wedding. This was relevant to the tribunal's assessment of the credibility of their evidence and claims to be in a spousal relationship. The tribunal's factual findings about the applicant's credibility and the veracity of his claims were open on the available material and for the reasons that it gave.

65. Ground eight is not made out.

Ground nine

66. The applicant's ninth ground of review is:

³⁸ Court book page 206 at paragraphs [16] to [18].

³⁹ Court book page 208 at paragraph [38].

67. *The Tribunal is unfair when it considers that the less numbers of attendees in the marriage ceremony makes the relationship ingenuine (sic). Inviting less number of people in the marriage ceremony was due to financial constraints.*

68. As stated above, the tribunal did not conclude that because the ceremony was small, the relationship between the applicant and sponsor was not genuine. Rather it found the inconsistent evidence and differing accounts of the wedding provided by the applicant, the sponsor and the witness Ms Kim at the hearing "*created doubts*", which led the tribunal to give the social aspects of their relationship "*lesser weight*".⁴⁰ No jurisdictional error arises from such reliance.
69. Further, there was no duty on the tribunal to put these inconsistencies to the applicant for comment. These inconsistencies are not "*information*" within section 359A(1) they do not "*in its terms*" constitute a rejection, denial or undermining of the visa applicant's claims to the visa, as required by *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 (HCA) at [17] and *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 at [22].
70. None of these matters were of "*dispositive relevance*" to the applicant's claims to the visa, as none in their terms denied that he was in a spousal relationship with the sponsor; rather they merely went to the applicant's credibility and so were not "*information*" within section 359A(1).
71. Ground nine is not made out.

Ground ten

72. The applicant's tenth ground of review is:

73. *The Tribunal failed to establish the companionship on the basis of applicant and sponsor's discussions about the marriage and husband's knowledge of wife's previous relationships. This is irrelevant when establishing commitment of the couple to each other. The Tribunal should have established it on the basis of their current situation and activities rather than about their discussions about the marriage.*

⁴⁰Court book pages 208 to 209 at paragraphs [37] to [42].

74. The applicant's knowledge of the sponsor's previous relationships was only one consideration in the tribunal's assessment of the couple's commitment to each other. The tribunal was concerned by the applicant's limited knowledge of the sponsor's previous life, including her previous partners, who were the fathers of her children,⁴¹ and found that the sponsor provided changing evidence in relation to her former relationships.⁴²
75. The tribunal found it puzzling that the parties could not provide a clearer picture in relation to the sponsor's previous relationships, which taken together with other identified concerns, caused it to give "lesser weight" to the nature of the parties' commitment to each other.⁴³
76. In substance, this complaint appears to take issue with the tribunal's factual conclusions about the applicant's claims and evidence and invites the Court to undertake impermissible merits review.
77. As such ground ten is not made out.

Ground eleven

78. The applicant's eleventh ground of review is:

79. The Tribunal acknowledges that the applicant and sponsor was consistent about some matters of the commitments but it failed to consider these when deciding on the application for review.

80. The tribunal comprehensively considered the applicant and sponsor's evidence; however, having done so, it was not satisfied that the parties were in spousal relationship at the time of the visa application and decision.⁴⁴ Such findings were open on the available materials and for the reasons that the tribunal gave.
81. Ground eleven is not made out.

⁴¹ Court book page 210 at paragraph [53].

⁴² Court book page 210 at paragraph [57].

⁴³ Court book page 210 at paragraph [58].

⁴⁴ Court book page 211 at paragraph [61].

Conclusion

82. As none of the applicant's grounds have been made out, the application must be dismissed with costs.

I certify that the preceding seventy (70) paragraphs are a true copy of the reasons for judgment of Judge Mercuri

Associate:

Date: 26 February 2019